Office-Supreme Court, U.S.
FILED
JUL 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1459

In the Supreme Court of the United States

OCTOBER TERM, 1985

GUILLERMO HERNANDEZ-CARTAYA AND
FRANCISCO J. FERNANDEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether counsel for a co-defendant commented in his closing argument on petitioners' silence at trial.

2. Whether the jury instructions properly informed the jury of the government's burden of proof.

3. Whether the district court abused its discretion by refusing to conduct a voir dire of the jury on the question whether any of the jurors had seen a newspaper article relating to the trial that was published after the jury had begun its deliberations.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 747 F.2d 1390.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1984. A petition for rehearing was denied on January 15, 1985 (Pet. App. A18). The petition for a writ of certiorari was filed on March 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of a variety of offenses arising out of a scheme to defraud the United States. Both petitioners were convicted of conspiring to defraud the United States, in violation of

18 U.S.C. 371. Petitioner Hernandez-Cartaya was also convicted on one count of willful attempted tax evasion, in violation of 26 U.S.C. 7201; two counts of willfully subscribing to false and fraudulent federal income tax returns, in violation of 26 U.S.C. 7206(1); and four counts of assisting others in the preparation of false and fraudulent federal tax returns, in violation of 26 U.S.C. 7206(2). Petitioner Fernandez was also convicted on three counts of willfully subscribing to false and fraudulent federal income tax returns, in violation of 26 U.S.C. 7206(1). Petitioner Hernandez-Cartaya was sentenced to five years' imprisonment and was fined $15,000. Petitioner Fernandez was sentenced to three years' imprisonment and was fined $10,000. The court of appeals affirmed (Pet. App. A1-A14).

1. a. Petitioners were officers of WFC Corporation, a large financial organization headquartered in Miami, Florida, that is primarily engaged in the business of arranging international loans, chiefly to countries and corporations in Central and South America (Pet. App. A5; 6 R. 1033-1035; 7 R. 1440; 9 R. 1879-1886, 2091-2092; 10 R. 2340-2343; 11 R. 2749, 2910).[1] From 1973 through 1978, WFC Corporation was extremely successful, and each year petitioners and their co-defendants agreed to award sizeable cash bonuses to themselves and other key company officers (Pet. App. A5). Petitioners and their colleagues further agreed not to report these bonuses as compensation on their federal income tax returns and instructed other recipients not to report their bonuses as well (*ibid.*). Petitioners also arranged for the corporation's accounting records to conceal the payment of these bonuses, which amounted to more than $100,000 each year (*ibid.*).[2]

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[1]The statement of facts and the citations to the record are taken from the government's brief in the court of appeals.

[2]The method by which petitioners and their confederates agreed to provide each other with bonuses and to conceal these funds from the

b. Of the six defendants who stood trial in this case, only Henry Heitman, Jr., who was ultimately acquitted, testified at trial (Pet. App. A9). In his testimony, Heitman described his conversations with petitioner Hernandez-Cartaya in which he told petitioner that he wanted to receive his annual bonuses in nontaxable business perquisites or personal loans rather than in cash, and he related the type of perquisites and loans that he had received (*ibid.;* 12 R. 3197-3235; Gov't C.A. Br. 49-52). Following his testimony, the government and Heitman's co-defendants moved to prevent Heitman's counsel from commenting on the other defendants' failure to testify (Pet. App. A9-A10; 2 R. 311-317; 13 R. 3358). The district court granted the government's motion and instructed Heitman's counsel to limit his closing argument to the fact that Heitman had testified and to the contents of Heitman's testimony (13 R. 3449, 3452-3454; see Pet. App. A10). The court also advised Heitman's counsel that he could inform the jury that his client's testimony stood unrebutted, but could not maintain that the only other person who could have described the pertinent transactions was petitioner Hernandez-Cartaya, who had chosen not to testify (Pet. App. A10; 13 R. 3452-3454).[3] Heitman's counsel expressly agreed to follow the court's instructions (13 R. 3454). The defendants objected

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Internal Revenue Service is too elaborate to warrant reiteration in this brief; it is fully detailed in the government's brief in the court of appeals. Gov't C.A. Br. 14-40. A copy of that brief has been lodged with the Clerk of this Court.

[3]The court further instructed Heitman's counsel that (13 R. 3452-3454):

> You may make any comment you wish to make, but you may not comment upon the failure, directly, of any other Defendant to testify, and you may not comment indirectly to the degree — upon the failure of any other Defendant to testify so that it might prejudice the other Defendants in the presentation of their case.

to the court's ruling, arguing that even the limited comments permitted would constitute an indirect comment on their failure to testify (13 R. 3459-3460).

In his closing argument, Heitman's counsel followed the court's instructions and did not directly comment on the failure of any of the other defendants' to testify (Pet. App. A10). He did, however, comment extensively on Heitman's testimony, arguing that his client alone chose not to accept the annual WFC bonuses in an illegal form (*ibid.*). Neither petitioners nor their co-defendants objected to the argument by Heitman's counsel. The following day, however, Heitman's co-defendants moved for a mistrial on the ground that Heitman's counsel had indirectly commented on their failure to testify (14 R. 3888-3889). The district court denied the motion (14 R. 3889).

c. Before delivering its charge to the jury, the district court supplied each defense counsel with a typewritten copy of the court's proposed jury instructions (12 R. 3316-3317). Among those instructions was a standard charge describing the government's burden of proof. That charge provided that the government was required to prove the defendants' guilt beyond a reasonable doubt, but not beyond all possible doubt. The court's charge to the jury (15 R. 3903-3904) included that instruction describing the government's burden of proof (see Pet. 14).[4] But, in giving that instruction, according to the court of appeals (see page 9 note 7,

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[4]The charge provided that (Proposed Instructions at 3B; 12 R. 3317 (emphasis added)):

> Thus, while the Government's burden is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all *possible* doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the defendant's guilt. A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

infra), the district court misspoke, erroneously substituting the word "reasonable" for the word "possible." However, the court instructed the jury on at least 19 other occasions during its charge that the government was required to establish each defendant's guilt beyond a reasonable doubt (15 R. 3904-3905, 3905, 3906, 3907, 3908 (twice), 3911, 3915, 3918-3919, 3922 (twice), 3924, 3926, 3927, 3928, 3930, 3931, 3932 (twice)). Moreover, the court also instructed the jury to " 'follow all of the Court's instructions as a whole' " and not " 'to disregard or give special attention to any one instruction' " (15 R. 3903-3904).

After retiring to deliberate, the jury sent the district court a note requesting a written copy of the court's jury charge (15 R. 3949-3950). The district court, after entertaining argument from defense counsel and the government on the jury's request (15 R. 3947-3950), agreed to provide the jury with a typewritten copy of the charge (15 R. 3551-3953). Petitioners did not ask the court to allow them to examine or proofread the typewritten charge before it was given to the jury; nor did petitioners ask the court for a copy of the typewritten charge that was actually submitted to the jury (Gov't C.A. Br. 99-100).

d. During the jury's deliberations, on Friday, July 3, 1981, a one-page article concerning the trial appeared on the third page of the local section of the *Miami Herald* (Ct. Exh. 8; Pet. App. A19-A23). The article generally described the evidence and events at trial (Pet. App. A19-A23), but it also reported a variety of rumors regarding WFC Corporation, such as an allegation that WFC was linked to Fidel Castro or, alternatively, to the CIA, that WFC was involved in drug trafficking, and that WCF was "a large-scale swindle" (*id.* at A22). The article also stated that no criminal charges had been filed for such matters, notwithstanding a wide-ranging investigation by a task force of agents from the Drug Enforcement Administration and Federal Bureau

of Investigation (*ibid.*). The article also noted that petitioner Hernandez-Cartaya had been arrested in Ajman, Saudi Arabia, before being arrested in Miami, that Saudi Arabian officials claimed that a bank operated by WFC was missing more than $30 million, and that Hernandez-Cartaya had been acquitted of conspiring to use a false passport to reenter the United States following his arrest in Saudi Arabia (*ibid.*). Lastly, the article quoted from two of the district court's rulings at trial as well as a comment that the court had made on the government's proof after the jury had retired to deliberate (*id.* at A20). On the next day that court was in session (the following Monday) the defendants asked the district court to voir dire the jurors separately to determine whether they had read or were aware of the article. The court said that it would defer ruling on the defense motion until the court had read the article and would issue its ruling later that day. That afternoon, the court denied the request (16 R. 3968, 3970).

2. The court of appeals affirmed petitioners' convictions (Pet. App. A1-A14). After conducting "a careful study of the closing argument" (*id.* at A10), the court found that "in only one instance did Heitman's attorney even come close to commenting indirectly on the [petitioners'] failure to testify at trial, and in this instance the statement was not of such character that the jury would take it to be a comment on" petitioners' silence. The one exception, the court noted (*id.* at A10-A11), concerned the statement by Heitman's counsel that the district court would instruct the jury, in considering Heitman's guilt, to " 'bear in mind' " that Heitman had explained " 'in detail every facet of what he did, did not do, or did know or didn't know' " and had " 'subjected himself to the rigors of the power of our government's cross examination * * *.' " That statement, the court held (*id.* at A11-A12), was not manifestly intended as a comment on the failure of Heitman's co-defendant's to testify and would not have been viewed as such by the jury.

The court also rejected petitioners' argument that the jury had been misinformed as to the government's burden of proof (Pet. App. A6-A9). The court concluded that the charge, when viewed as a whole, clearly informed the jury that the government was required to prove petitioners' guilt beyond a reasonable doubt (*id.* at A8-A9). The court noted (*id.* at A8) that the district court had correctly instructed the jury on this matter on at least 19 different occasions during its charge and that the district court, when addressing the particular statutes petitioners were alleged to have violated, told the jury that the government was required to establish petitioners' guilt beyond a reasonable doubt on those charges. The court also observed (*id.* at A9) that none of the six defense counsel had objected to the jury charge either during or after its presentation. The court thus held that the district court's isolated misstatement could not have misled the jury as to the correct burden of proof (*ibid.*).

Finally, after reviewing the evidence and the *Miami Herald* article, the court also held (Pet. App. A12-A13) that the district court had not abused its discretion by declining to conduct a voir dire of the jury to determine whether any of its members had read or heard of the article. Most of the information contained in the article had been received in evidence at trial, the court noted (*id.* at A13), and the remainder did not relate to the charges against the defendants (*ibid.*). Moreover, given the district court's specific instructions to the jurors not to read or listen to media accounts of the trial, which the jurors were presumed to have followed, the likelihood that the jurors had read the article was small (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The court of appeals simply applied

well-settled legal principles to the facts of this particular case. Accordingly, review by this Court of petitioners' fact-bound claims is not warranted.

1. Petitioners argue (Pet. 15-17) that counsel for co-defendant Heitman improperly referred during his closing argument to their decision not to testify at trial. Petitioners do not object to the standard applied by the court of appeals to determine whether permitting those remarks was erroneous;[5] rather, petitioners simply challenge the court of appeals' application of that test to the particular facts of this case. However, both the district court (14 R. 3888-3889) and the court of appeals (Pet. App. A11-A12) found that the statements by Heitman's counsel were not an indirect comment upon petitioners' silence. Given these concurrent findings by the lower courts, review by this Court of petitioners' fact-bound claim is unwarranted. See, *e.g., United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8.[6]

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[5]The test applied by the court of appeals—whether the statements were manifestly intended to be, or were of such character that a jury would naturally and necessarily take them to be, a comment upon petitioners' silence (Pet. App. A11)—has been adopted by every federal court of appeals. See *Butler* v. *Rose*, 686 F.2d 1163, 1170 & n.6 (6th Cir. 1982) (en banc) (collecting cases).

[6]In any event, the court of appeals correctly rejected petitioners' claim. To begin with, petitioners did not object to the statements they now challenge until the day after the closing argument by Heitman's counsel (14 R. 3888-3889). Petitioners therefore cannot prevail unless permitting those remarks amounted to plain error. See *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 12-15; *United States* v. *Frady*, 456 U.S. 152, 163 (1982). No such error occurred in this case.

As the court of appeals found (Pet. App. A10), the remarks by Heitman's counsel, with one exception, did not approach being an indirect comment upon petitioners' silence, and that exception was not likely to be perceived as such by the jury. Heitman's counsel merely commented on his client's testimony, such as his client's desire to receive perquisites and loans, rather than cash (14 R. 3709-3710, 3725-3741), and the government's failure on cross-examination to elicit any damaging admissions from his client (14 R. 3725-3736, 3741-3743). Contrary

2. Petitioners contend (Pet. 13-14) that the district court erred by submitting to the jury a transcript of the court's oral jury instructions that contained a misstatement of the government's burden of proof. As noted above (pages 4-5), the error resulted in the substitution of the word "reasonable" for the word "possible" in connection with the court's description of the government's burden of proof. Petitioners claim that this error allowed the jury to find that petitioners had committed the charged offenses without being convinced of their guilt beyond a reasonable doubt. That claim lacks merit.[7]

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to petitioners' claim (Pet. 7, 15), Heitman's counsel did not attempt to distinguish his client from petitioners or their other co-defendants on the ground that Heitman alone had testified. Rather, as the court of appeals observed (Pet. App. A12), "the remarks made by Heitman's attorney were clearly intended to point out that Heitman did not wish to receive cash bonuses and that the government's evidence and cross examination had failed to refute Heitman's testimony * * *." It is most unlikely that the jury would have viewed these remarks as a reference to petitioners' silence. Furthermore, the district court instructed the jury that " 'no inference whatever may be drawn from the election of a defendant not to testify' " (15 R. 3904-3905). It is well settled that the jury is presumed to follow the court's instructions. See *Carter* v. *Kentucky*, 450 U.S. 288, 302-303 n.20 (1981); see also *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 5 & n.6. Indeed, the jury acquitted two of petitioners' co-defendants who also did not testify (see 18 R. 4015-4017), which demonstrates that the jury did not base its determinations on a defendant's decision to remain silent. See *United States* v. *Young*, slip op. 17 n.15.

[7]We note that there is some doubt as to whether the jury was in fact erroneously instructed on this matter. In the court of appeals, petitioners argued that the district court had correctly instructed the jury and the court reporter had erred in transcribing the court's jury charge. See Hernandez-Cartaya C.A. Br. 39-44; Fernandez C.A. Br. 14-22. The government argued that it was unclear from the record whether (1) the district court had given the correct instruction and the court reporter had incorrectly transcribed the instruction or (2) the district court had misspoken and the court reporter correctly transcribed what the district court had said. Gov't C.A. Br. 97-100. Moreover, we argued in the court of appeals that there was no evidence that the transcript containing the

It is well settled that a single jury instruction may not be considered in isolation, but must be viewed in the context of the overall charge and the entire record of the trial. See *Henderson* v. *Kibbe,* 431 U.S. 145, 152, 153-156 (1977); *United States* v. *Park,* 421 U.S. 658, 674-676 (1975); *Cupp* v. *Naughten,* 414 U.S. 141, 146-147 (1973). Petitioners do not claim that the district court's oral jury instructions were erroneous; on the contrary, petitioners themselves readily acknowledge (Pet. 14) that "there is absolutely no evidence of record that the trial court's oral charge misstated the burden of proof." Moreover, as the court of appeals pointed out (Pet. App. A8), the district court correctly stated on at least 19 different occasions during its charge that the government was required to prove beyond a reasonable doubt that each defendant was guilty (15 R. 3904-3905, 3906, 3907, 3908 (twice), 3911, 3915, 3918-3919, 3922 (twice), 3924, 3926, 3927, 3928, 3930, 3931, 3932 (twice)). The district court also made it clear that the evidence on each count must prove beyond a reasonable doubt that petitioners had committed the charged offense (Pet. App. A8). Indeed, in instructions given side-by-side with the one that petitioners challenge (*id.* at A7), the district court clearly stated the correct burden of proof. And the court's charge that no one instruction could be considered in isolation plainly reinforced these earlier, correct statements of the law (15 R. 3903-3904). Accordingly, it would be unrealistic to conclude that the jury fastened upon a single erroneous charge and was thereby misled into believing that a

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erroneous charge was the copy that was in fact given to the jury (*ibid.*). At trial, none of the defendants asked to proofread the transcript; nor did they seek to obtain a copy of those instructions. The court of appeals, however, assumed that the erroneous charge had been delivered orally and that the transcript submitted to the jury contained the erroneous jury instruction. Pet. App. A7-A9. Because petitioners' claim must fail in any event, it is unnecessary to determine who is correct on this score.

lesser burden of proof was required. See *United States* v. *Vasilaky*, 168 F.2d 191 (2d Cir. 1948); see also *United States* v. *Walsh*, 627 F.2d 88, 92-93 (7th Cir. 1980); *United States* v. *Pepe*, 501 F.2d 1142, 1144 (10th Cir. 1974); *Hoover* v. *United States*, 358 F.2d 87, 88 (5th Cir. 1966), cert. denied, 385 U.S. 822 (1966).[8]

3. Petitioners argue (Pet. 8-13) that the district court erred in refusing to conduct a voir dire of the jury to determine whether any jurors had read a newspaper article relating to the trial that was published after the jury had begun its deliberations. That fact-bound claim does not warrant further review.

It is well settled that the district court "has substantial discretion in deciding whether allegations [of prejudice affecting the jury's verdict] are of sufficient substance to require investigation and, if so, how the investigation should be conducted." 3 C. Wright, *Federal Practice and Procedure: Criminal* § 554, at 261-262 (1982) (footnote omitted). The publication of a newspaper article that relates to an ongoing trial does not invariably require a voir dire of the jury to determine whether the jurors have read the article and, if so, have been influenced by its contents. Rather, the courts of appeals have recognized that a district court is not required to interrogate the jury about publicity concerning a trial unless the material goes beyond the record on which the case is to be submitted to the jury and

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[8]None of the cases cited by petitioners are to the contrary. See, *e.g.*, *Dunn* v. *Perrin*, 570 F.2d 21, 24-25 (1st Cir.), cert. denied, 437 U.S. 910 (1978) ("reasonable doubt" defined erroneously three times and in a manner that shifted the burden of proof to the defendant); *United States* v. *Corrigan*, 548 F.2d 879, 883-884 (10th Cir. 1977) (self defense instruction shifted burden of proof to defendant or lightened government's burden of proof); *Notaro* v. *United States*, 363 F.2d 169 (9th Cir. 1966) (confusing jury charge on burden of proof relating to entrapment).

raises serious questions of possible prejudice to the defendant. See, *e.g.*, *United States* v. *Herring*, 568 F.2d 1099, 1104 (5th Cir. 1978); *United States* v. *Lord*, 565 F.2d 831, 838 (2d Cir. 1977); *United States* v. *Perrotta* 553 F.2d 247, 249-250 (1st Cir. 1977); *United States* v. *Jones*, 542 F.2d 186, 194-195 (4th Cir.), cert. denied, 426 U.S. 922 (1976); *Gordon* v. *United States*, 438 F.2d 858, 872-873 & nn.43-44 (5th Cir.), cert. denied, 404 U.S. 828 (1971); see also *United States* v. *Taylor*, 569 F.2d 448, 454 (7th Cir.), cert. denied, 435 U.S. 952 (1978); *United States* v. *Abascal*, 564 F.2d 821, 833-834 (9th Cir. 1977), certs. denied, 435 U.S. 942 and 953 (1978). In addition, the court may decline to question the jury if there is no reasonable likelihood that prejudicial material has reached the jury, such as where the allegedly-prejudicial article "was published in a relatively obscure manner" (*United States* v. *Herring*, 568 F.2d at 1105; accord, *United States* v. *Jones*, 542 F.2d at 194; *United States* v. *Lord*, 565 F.2d at 838; cf. *United States ex rel. Doggett* v. *Yeager*, 472 F.2d 229, 239 (3d Cir. 1973), disapproved on other grounds, *Murphy* v. *Florida*, 421 U.S. 794 (1975)).[9] The initial determination whether publicity contains material outside the record raising serious questions of possible prejudice and whether the publicity was likely to have reached the jury is largely committed to the trial court's discretion. See *United States* v. *Jones*, 542 F.2d at 194; *United States* v. *Perrotta*, 553 F.2d at 250; *Gordon* v. *United States*, 438 F.2d at 872-873; see also *United States* v. *Abascal*, 564 F.2d at 833; cf. *United States* v. *Chiantese*, 582 F.2d 974, 978-980 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979).

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[9]The cases cited by petitioners (Pet. 11 n.9) do not hold that the mere possibility that jurors have been exposed to prejudicial publicity is enough to require the court to conduct a voir dire of the jurors.

In this case, the court of appeals correctly held that the district court did not abuse its discretion by declining to question the jury regarding the article. The court of appeals found that (Pet. App. A13) "[m]ost of the information contained in the article did not go beyond the record as developed at trial." It is unnecessary to question the jury where a newspaper article does not reveal information not already before the jury. See, *e.g., United States* v. *Herring,* 568 F.2d at 1104; cf. *Murphy* v. *Florida,* 421 U.S. 794, 800 n.4 (1975). Moreover, the article did not reveal that petitioners had previously been convicted for the same crimes; it did not disclose incriminating evidence, such as a coerced confession, that the court had suppressed from evidence; it did not allege that petitioners had threatened a government witness; and it did not speculate as to petitioners' guilt or innocence or discuss the merits of any defense they had asserted. Factors such as these have commonly been present in cases in which the courts of appeals have held that a district court should have conducted a voir dire of the jury. See, *e.g., United States* v. *Herring,* 568 F.2d at 1104-1105; *United States* v. *Lord,* 565 F.2d at 838.[10]

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[10]None of the vast number of cases cited by petitioners conflicts with the decision in this case. For instance, this was not a case where the trial proceedings themselves were infected by prejudicial conduct. See, *e.g., Sheppard* v. *Maxwell,* 384 U.S. 333 (1966). The article did not assert that petitioners had previously been convicted of the same offenses under consideration, but that their convictions had been reversed on appeal. See, *e.g., United States* v. *Attell,* 655 F.2d 703, 704-705 (5th Cir. 1981); *United States* v. *Williams,* 568 F.2d 464, 466 (5th Cir. 1978). There was no allegation that petitioners had harmed or threatened a government witness. See, *e.g., United States* v. *Herring, supra; United States* v. *Lord, supra.* The article did not state that petitioners had previously been convicted of a crime or that petitioners had been accused of any offense other than those of which the jury was already aware. See, *e.g., Marshall* v. *United States,* 360 U.S. 310, 311-313 (1959); *United States* v. *Trapnell,* 638 F.2d 1016, 1021-1022 (7th Cir. 1980). See page 14 note 11, *infra.* Moreover, the article did not refer to any actions taken by petitioners or others involved in the crimes at issue

Petitioners claim (Pet. 11) that they were prejudiced by "the revelation of unflattering information * * * unrelated to the specific charges" against them. But much of this information was brought out by the defense at trial, often during cross-examination of government witnesses.[11] The

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that were inconsistent with petitioners' claim of innocence. See, *e.g.*, *Goins* v. *McKeen*, 605 F.2d 947, 949-954 (6th Cir. 1979); *United States* v. *Pomponio*, 517 F.2d 460, 462-463 (4th Cir.), cert. denied, 423 U.S. 1015 (1975).

[11]For example, the article stated (Pet. App. A20-A22) that petitioner Hernandez-Cartaya was a veteran of the Bay of Pigs; that the defendants, like several of the government's witnesses, shared certain privileges at WFC, such as "expense accounts, private loans, luxury cars and big salaries"; and that WFC was rumored to be "linked" to the CIA, to Fidel Castro, or to drug trafficking, and that "WFC was a large-scale swindle." However, it was no secret to the jurors that petitioner Hernandez-Cartaya was a veteran of the Bay of Pigs (10 R. 2393; 12 R. 3196). Similarly, the jury was well aware of the large salaries and perquisites that the senior officers of WFC received (see, *e.g.*, 6 R. 987, 997, 1000-1004, 1016-1017, 1045-1046, 1132-1133; 7 R. 1216-1217, 1219-1243, 1317-1318, 1330-1340, 1348-1380; 8 R. 1791-1853; 9 R. 1969-2000, 2006, 2184; 10 R. 2373-2376, 2460-2466, 2497-2499, 2543-2545, 2558-2569; 11 R. 2687, 2701-2704, 2713-2716, 2807-2809, 2862-2865, 2870-2871; 13 R. 3402-3405, 3409-3410, 3419-3420). Indeed, much of the government's proof consisted of demonstrating that portions of the cash bonuses given to WFC senior officials were applied towards various loans that they had previously received (see, *e.g.*, 6 R. 1000-1010, 1019-1030; 7 R. 1219-1221, 1330-1340, 1348-1380; 8 R. 1691-1696; 9 R. 2100-2103; 10 R. 2455-2457, 2553-2555, 2559-2566; GX 49, 52, 53A-53C, 68-71, 80, 152, 163). In addition, one of petitioner Hernandez-Cartaya's character witnesses brought out petitioner's links to Cuba (12 R. 3291-3294), and the allegations reported in the *Miami Herald* that WFC was a "large-scale swindle" (Pet. App. A22) came out, as the article itself notes (*id.* at A23), during the cross-examination of a government witness by counsel for petitioner Fernandez (11 R. 2763-2765, 2773-2774). Indeed, the article specifically noted that allegations such as the last one were merely rumors and that no criminal charges had been filed. Thus, the article tended to discredit, rather than to reinforce, various allegations of possible wrongdoing.

Similarly, defense cross-examination elicited information regarding WFC's connections with the CIA (8 R. 1575-1576); certain bank frauds (9 R. 1908, 2049-2056, 2167-2168; 10 R. 2620; 11 R. 2771-2772, 2917; 12

article also expressly stated that most of the items cited by defendants as prejudicial were merely rumors and unproven allegations; the article itself thus contained a warning on its face regarding the truth of these items. Petitioners also argue (Pet. 10) that a quotation in the article from the district court could have misled the jury that the government need not prove that they had acted with criminal intent.[12] But the court repeatedly instructed the jury to the contrary (15 R. 3914, 3915, 3918, 3922, 3923, 3924, 3925, 3926, 3928, 3929, 3930, 3931, 3932). The jurors thus could not have been misled by this aspect of the article. Petitioners also claim (Pet. 4) that the article, by quoting the district court's finding that the government had proved that a conspiracy had existed, could have prejudiced the jury's consideration of the evidence.[13] But the district court carefully instructed the jury on numerous occasions that the government was required to prove its case beyond a reasonable doubt (pages 5, 10, *supra*). In any event, the district court is

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R. 3244-3245); phony passports (10 R. 2592-2606, 2620-2621); illegal commissions and political payoffs (6 R. 1035, 1038-1041; 7 R. 1440, 1447, 1465-1466; 9 R. 1879, 2027-2030; 11 R. 2763-2765); and various government investigations of WFC and its officers (see 9 R. 1894-1895, 1908-1913, 2049-2051, 2055-2056, 2168-2170; 12 R. 3244-3245). There was also testimony, again brought out primarily by the defendants, that petitioner Hernandez-Cartaya went to Ajman to resolve a dispute the WFC bank was having with that nation's government (9 R. 2167-2168; 10 R. 2592-2606, 2620-2621; 11 R. 2917-2918, 2921, 2923). Furthermore, the defense also brought out that Cartaya had escaped from Ajman using a phony passport (10 R. 2592-2606, 2620-2621).

[12]As support for this argument, petitioners rely upon a quotation in the article of a remark by the district court that " '[t]he government says that Mr. Cartaya received a bonus of $50,000 and he didn't report it. If you believe he got it, then he's guilty' " (Pet. App. A19-A20).

[13]The article stated (Pet. App. A21): "[Judge] Gonzalez ruled last Friday that 'there is substantial independent evidence of a conspiracy.' He refused to dismiss the conspiracy charges after [the prosecutor] ended prosecution testimony."

entitled to comment upon the evidence at trial (see *Quercia* v. *United States*, 289 U.S. 466, 469 (1933)), and the comment quoted here was unlikely to have caused petitioners prejudice. Beyond that, only one article was at issue, and it did not appear in a prominent location (*i.e.*, it appeared on the third page of the local section of the *Miami Herald*). Compare, *e.g.*, *United States* v. *Lord*, 565 F.2d at 838; *United States* v. *Perrotta*, 553 F.2d at 249.

Finally, the district court repeatedly instructed the jury not to listen to or read any media accounts of the proceedings (6 R. 899-901, 1210; 7 R. 1505; 8 R. 1861; 9 R. 2248-2249; 10 R. 2629-2630; 11 R. 2937-2938; 12 R. 3307; 13 R. 3641-3642; 14 R. 3887; 15 R. 3943, 3964; 16 R. 3971; 17 R. 4000; 18 R. 4007)[14] and to base its verdict " 'solely upon what you hear in this courtroom and not what somebody else says happened in the courtroom' "(6 R. 900; see also 13 R. 3461; 15 R. 3903-3904, 3461). These instructions further negated any realistic danger that the article could have prejudiced the jury. See, *e.g.*, *United States* v. *Herring*, 568 F.2d at 1105.[15] Accordingly, the court of appeals correctly held that the district court did not abuse its discretion by declining to voir dire the jury on this matter.[16]

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[14]The district court also instructed the jurors at the outset of trial not to read any newspaper article with a headline referring to a tax trial (6 R. 900).

[15]Petitioners err in asserting (Pet. 12) that a court's instructions to the jury to avoid reading about a pending trial may not be considered, along with an article's contents, in determining whether the jury should be questioned. While such instructions by themselves may not be sufficient to justify declining to question the jury, they are nonetheless a legitimate factor to consider. See *United States* v. *Herring*, 568 F.2d at 1104-1105; *Gordon* v. *United States*, 438 F.2d at 873-874; see also *United States* v. *Ricardo*, 619 F.2d 1124, 1132 (5th Cir.), cert. denied, 449 U.S. 1063 (1980).

[16]Moreover, we also argued in the court of appeals (Gov't C.A. Br. 92) that, given the overwhelming proof of petitioners' guilt, any error was harmless. See *United States* v. *Trapnell*, 638 F.2d at 1023-1024.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1985

DOJ-1985-07